No. 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

SAM FOX PUBLISHING COMPANY, INC., ET AL.,
Appellants

v.

UNITED STATES AND AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS

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I

JURISDICTION AND RELIEF

The concession by the United States (Br. pp. 30-34) that the Court has jurisdiction to determine whether appellants' motion to intervene was improperly denied appears to make further discussion of that issue unnecessary. Neither the opinions of this Court nor the

textwriters support the formalistic limitations on the Court's jurisdiction which are urged by ASCAP (Br. pp. 24-30).

Appellee United States, however, raises questions as to the nature of the further proceedings in the District Court in the event this Court concludes that appellants were improperly denied their right to intervene (Br. pp. 34-36). Referring to appellants' "failure to take any action to prevent the 1960 modifications from becoming effective" (p. 35), it is suggested that the modifications could not be set aside, and that, in effect, appellants should be remitted to a new proceeding for new or further modifications.

We are not aware of any "failure" on the part of appellants; as rebuffed intervenors, they clearly had no standing to prevent the District Court from entering the order of January 7, 1960, approving the amended consent judgment, nor to appeal from that order. *Brotherhood of Railroad Trainmen* v. *Baltimore & O. R. Co.*, 331 U.S. 519, 524. Whatever is decided as to further proceedings should certainly not reflect a belief that appellants have failed to take proper steps available to them.

Appellees are not unmindful, however, of the practical problems that are involved, and we do not suggest a doctrinaire approach to their resolution. We would suggest that, in the event the Court determines that appellants should have been permitted to intervene prior to the District Court's decision approving the proposed modifications, the matter should be remanded to the District Court to determine the extent to which the proposed modifications of the 1950 judgment should remain temporarily operative until the appellants have had their day in court. This course would avoid the difficulties which appellee United States en-

visages and would permit the necessary decision on the matter to be made by the court most familiar with its practical and procedural aspects. At the same time it would avoid confronting appellants with a *fait accompli* and would permit a full hearing on full facts on the issues which appellants earlier sought to have resolved.

II

THE GOVERNMENT ADVANCES NO PERSUASIVE GROUNDS FOR CONCLUDING THAT ITS REPRESENTATION WAS ADEQUATE

Appellee United States strives to have the issue as to the adequacy of its representation of the interest of appellants and of the ASCAP general membership decided on general principles and without consideration of what has occurred in this case. Because the Government ordinarily represents the public interest, as appellants have already acknowledged, the United States urges in effect that in no Government antitrust case—or, indeed, in any suit brought by the United States—could circumstances arise in which Federal Rule 24(a)(2) would have applicability. We do not believe that this Court intended the field of Government litigation to be wholly outside the reach of this provision of the Federal Rules. On the contrary, Rule 24(a)(2) has an important function in this area; it provides a corrective procedure when Government agencies plainly fail to discharge their duties in litigation they have undertaken, and their inadequate representation is clearly established.

Appellee United States, relying upon generalized statements characterizing the Attorney General as the representative of the public interest in all Government suits (Br. pp. 38-50), would sidestep the necessary inquiry into what actually occurred in the proceeding

in which intervention was denied. This, and not statements of general doctrine, should be the basis for resolving the issues presented in the appeal. Appellants attempted such an inquiry in their brief (pp. 40-55), and our conclusion that the representation by the Department of Justice was inadequate is not refuted in the few pages the Government has devoted to the matter (Br. pp. 51-54).[1]

Appellants' inquiry, moreover, did not call for a "subjective evaluation" of the Department's conduct in negotiating the modifications of the 1950 judgment; nor is it necessary to inquire whether the Government's representatives acted "conscientiously", or whether they "misstated the facts" (Br. pp. 37, 40). In resolving the question of adequate representation by the Government that is here presented, the Court need only analyze what the Department consented to and measure the result against the protection the ASCAP general membership should receive under the antitrust laws from the domination of the Society's affairs by the largest publishers.

By this standard the Department's representation is plainly inadequate. Thus, the Department does not explain how "'very substantial strides . . . in diminishing concentration of control'" by the larger members are achieved if they are enabled to continue to

[1] In short, contrary to the Government's belief, appellants did charge and undertook to document nothing other than "nonfeasance in [the Government's] duty of representation" of the ASCAP general membership (see U.S. Br. pp. 40-41). Indeed, appellants did not previously so label their claims out of deference to the Department of Justice, and not because of any belief that the course followed by it did not constitute "nonfeasance". Appellants recognize that the inadequacies of the representation by the Department may have resulted from the extremely complicated and technical nature of ASCAP's internal operations. This, however, is a reason for allowing the intervention by appellants who have been members of the Society for many years.

exercise a clearly dominant voting power in the Society.[2] Nor does its statement that the 1960 modifi-

[2] In summarizing the voting provisions of the 1960 modifications the Government's brief mistakenly states that "the basis of voting was changed from income receipt to *current performance of compositions* (thus favoring the newer members over the older ones)" (p. 52; emphasis added). The Government has confused "current performance" with "performance credits". It is the latter that are the basis upon which a member's vote is determined under the 1960 modifications (see R. 674), and, as the record makes clear, performance credits awarded to any work now and in the future will be very much affected by the extent to which, and the "uses" for which, the work has been performed in the past. See R. 211, 332. Works that meet the historical "use" tests set forth in the 1960 modifications will receive greater performance credits than other works. See Weighting Rules, Sec. (B)(1) *et seq.*, R. 690-692. Thus, the apportionment of votes by "performance credits" gives no assurance of "favoring the newer members over the older ones", and as appellants have indicated (Br. pp. 52-53), with regard to at least one type of "use", the system created by the judgment assures that the works of the largest publishers will be included in the category of works receiving greater performance credits.

Nor does the requirement of the judgment (R. 691) that a work receiving greater performance credits must also continue to secure a certain number of performance credits for "feature uses" in current years mitigate the impact of the large number of "feature" performance credits that have been accumulated over the years by the older works of the largest publishers. The brief of appellee ASCAP (pp. 50-51) implies that this provision imposes a substantial minimum requirement of "feature" performances in current years on these older works. In fact, however, the requirement imposed (2,500 feature performances over a five-year period) is so minimal that such older works receiving greater performance credits on a historical basis are assured of achieving the minimum for current years and thus of retaining their preferred status. It is further significant that the older works of the largest publishers receive a disproportionate number of feature performances on network television and radio (see ASCAP Hearings, p. 37), and that the ASCAP survey of performances gives very great weight to such network performances, which are all reported in the survey—the average multiplier for network television being 242 and for network radio being 60 (R. 235, 236).

cations "circumscribe[d] very sharply what the [Directors] may do in the area of surveys" respond to appellants' offer to prove that the Directors' control of the operations for collecting the survey data will enable them to continue to distort the ultimate results of the survey to favor certain members over others in the distribution of license revenues. Compare U.S. Br. pp. 37, 52, 53-54. These basic deficiencies in the Government's representation of the interests of ASCAP's general membership, which are unexplained in its brief, together with the others to which the motion to intervene made reference, fully warrant the conclusion that the representation by the Government was inadequate.

The salient aspects of these inadequacies are set forth in our brief at pages 41-52. One further aspect, however, warrants an additional comment in the light of appellees' arguments.

Appellees attempt at some length to justify the provisions in the 1960 modifications by which greater performance credits—and hence greater revenue distributions—are awarded certain defined works over others when performed for identical non-feature uses such as background, theme or jingle music. See Sec. VI(F) and "Weighting Rules," R. 674, 689 *et seq.* Appellee ASCAP, for example, defends a distinction which can give one work 100 times the performance credits of another performed for an identical "use" on the ground of an assumed "inherent value of the music itself," purportedly derived from the use of the music in the past (U.S. Br. pp. 14-15; ASCAP Br. pp. 8, 15).

The nature of the hearing conducted in the District Court prevented appellants from adducing proof that in fact this discrimination embodied in the 1960 modifications would have the practical result of favoring the

very group of large publishers whose anticompetitive activities the antitrust action was designed to curb, and at the expense of the very members of the Society whose interests were sought to be protected. The new "Weighting Rules" that determine which works will receive greater performance credits are such as to preserve almost all of the advantage which the works of the dominant publishers had received under the anti-competitive practices of the past. See App. Br. 52-53.

Moreover, appellants also asserted in the proceeding below that this discrimination in favor of the dominant publishers permitted them to secure an even more unwarranted share of the revenues of the Society by reason of the fact that at least three of the largest publishers are subsidiary corporations of large moving picture producers. These publishers are thus enabled to have their own works which are entitled to greater performance credits performed for "background" or other non-feature uses in moving pictures produced for television, where the performances will be reported in the ASCAP survey (DR. 1105, 1137-1138; see ASCAP Hearings, pp. 37, 233-235). ASCAP cannot, of course, prevent the moving picture companies from using the songs of their own publishing subsidiaries for non-feature uses in the films they produce, even when there is no reason for using a particular work other than that it is owned by the subsidiary. There is no basis, however, for giving the large publishers who have this opportunity an advantage of 100 to 1 when their works are so used, particularly when the Society's revenue distributions for non-feature uses are very substantial. See App. Br. p. 52n.

Appellants believe that the only justifiable reason a musical work is selected for background or other non-feature use is that it is believed by the user of the

music to be best suited for his particular purposes. When a work is thus selected and performed, it should receive performance credit on a par with any other work performed for the same "use". If it is a work which, for any reason, is particularly desirable for some non-feature use, it will be performed more often and receive more credits. The "inherent value" of a work for "background" music or other non-feature use, in other words, can only be measured by its use for this purpose, and not by its "popularity" for entirely different purposes.

III

THE 1960 JUDGMENT BINDS APPELLANTS AS MEMBERS OF THE SOCIETY

1. Both appellees assert that the 1960 judgment "does not purport to set maximum limits on what ASCAP may do to correct any deficiencies in its internal operations and in the relationships among its members", but that the judgment "merely specifies certain minimum standards that ASCAP must meet" (U.S. Br. p. 57; ASCAP Br. p. 40). They contend that the judgment does not bar ASCAP members from suing to compel the Society, for example, to eliminate the weighted voting system entirely as violative of the antitrust laws, or to prevent the Society from distinguishing in performance credits awarded to different compositions or performances. Appellees contend, for these reasons, that the judgment has no *res judicata* effect upon appellants as members of ASCAP.

Both the Government and ASCAP disregard significant provisions of the 1960 judgment relating to voting and the distribution of revenues in the Society which sharply proscribe the relief that appellants or

other members could secure in a private antitrust suit against the Directors and the largest publishers. Appellants could obtain no relief that is different in kind or degree from any provisions of the judgment which compel the Society to take certain specific action in the areas of its internal affairs covered by the judgment. To this extent at least appellants and other ASCAP members are bound by the terms of the modifications agreed upon by the Government and the Society's Directors.

Thus, Section IV(B) (R. 674-675) sets forth the basic voting formula that must be followed by ASCAP in allocating votes for performance credits if the Society employs any weighted voting system at all. If an ASCAP member brought an antitrust suit to secure adoption of a weighted voting system under which the largest publishers—*i.e.*, those having the greatest performance credits—would be limited to a smaller vote, they would be met by the objection that any such relief would require alteration of the voting formula of the 1960 judgment. If an ASCAP member in such a suit were to urge that ASCAP members who seek to elect a director through the "petition procedure" created by Section IV(E) (R. 676) should not be barred from casting some or all of their votes for the remaining directors,[3] they would again be informed that this relief was precluded by the specific terms of the section. The necessity for private antitrust relief that would modify these and other of the voting provisions of

[3] Since an ASCAP member is ordinarily permitted to cast his total number of votes for each of the twelve publisher or writer directors (Art. Ass'n, Art. 4, Sec. 4, Par. (g); ASCAP Hearings, p. 487), members who join in the petition procedure must surrender their right to vote for the eleven directors other than the director for whom they petition.

Section IV would loom large in a private suit if it should develop that the weighted voting system could not be eliminated entirely by reliance upon the antitrust laws.

Similarly, provisions of the judgment that control the distribution of license revenues could not be altered in private antitrust litigation. Members seeking private antitrust relief in this area of the Society's internal affairs would be restricted to an attempt to eliminate *all* "distinctions as to the amount of credit given to various works or performances" since no such distinctions may be made by ASCAP except as specifically set forth in the part of the 1960 modifications entitled "Weighting Rules". See Sec. III(F), R. 674; and R. 689 *et seq.*

These restrictions upon relief that could be secured in a private antitrust suit would stem not only from the Court's decision in *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356, to which we have referred (App. Br. pp. 60-62), but also from *Sovereign Camp, Woodmen of the World* v. *Bolin*, 305 U.S. 66. There the Court held that the decision in a prior suit by a policyholder against an unincorporated insurance association to determine the lawfulness of certain provisions of its insurance policies was *res judicata* in a subsequent suit by another member involving those same provisions. The Court stated that in the prior suit the association represented all its members and stood in judgment for them, "and even though the suit had a different object than the instant one it is conclusive upon all the members of the association with respect to all rights, questions, or facts therein determined". 305 U.S. at pp. 78-79.

2. There is no merit to the argument of appellee ASCAP (Br. p. 39) that appellants could not be in-

adequately represented by the existing parties in the proceeding in the District Court and at the same time bound by the 1960 modifications as members of the Society. The argument neglects the plain language of Rule 24(a)(2) which contemplates that both requirements of the Rule be met by an applicant-intervenor. Since the Rule may be invoked only if the applicant is already represented in the litigation, and the representation must be such as would bind the applicant, ASCAP's interpretation of the Rule would preclude it from ever being applied.

Further, ASCAP's reliance upon *Hansberry* v. *Lee*, 311 U.S. 32, is misplaced. There the antagonistic members of the class or group that was purported to have been represented in a prior suit had interests that could be severed from the interests of the other members, and the Court could accordingly rule that there was no "single class". Because the interests of the "class" were severable, the judgment in the prior suit could be given full effect against those persons who were named as parties to that proceeding. 311 U.S. at p. 44. Here, however, all the ASCAP members are, by virtue of their membership status, inextricably joined together and must abide by the terms of the 1960 judgment against the Society just as shareholders must abide by a judgment against their corporation, if the judgment is to operate at all. The alternative for a dissenting member is to resign from the Society, which is a course that is neither practical nor desirable, as we have already indicated (App. Br. pp. 33-34).[4]

[4] The state court action to which appellees refer (U.S. Br. p. 60; ASCAP Br. p. 39), Lengsfelder v. Cunningham, Index No. 13344-1957 (N.Y. Sup. Ct.), that was brought in 1957 by one of the appellants and other ASCAP members against the Society's Directors and officers, does not indicate that that appellant did

IV

ASCAP'S DISPUTE WITH THE FACTUAL REFERENCES CITED BY APPELLANTS

Appellee ASCAP objects to appellants' reliance in the District Court, and in this Court, upon factual references from the record and from the ASCAP Hearings conducted by the Subcommittee of the Select Committee on Small Business of the House of Representatives (Br. pp. 46-54). Wherever possible, appellants relied upon information in the record or in the ASCAP Hearings which was either undisputed by anyone or which was supplied by the Society's Directors. Necessarily, however, in seeking to establish that they were inadequately represented, appellants also were required to rely upon factual assertions which were in dispute but with respect to which they were fully prepared to adduce competent testimonial and documentary evidence at the hearing in the District Court. It is as to these assertions that appellants made offers of proof, and an opportunity should be afforded them to prove their claims. *Cf. Pyle-National Corp.* v. *Amos*, 172 F. 2d 425, 427 (7th Cir. 1949).

Indeed, the position of ASCAP is quite inconsistent. In a "Memorandum in Support of Proposed Consent

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not consider itself bound by the terms of the 1950 judgment, which was then in effect. Indeed, Paragraph 56 of the Second Amended Complaint filed April 9, 1958, the allegations of which are admitted by the defendants in their Answer, acknowledges the binding effect of the antitrust judgment upon the plaintiffs as members of the Society and upon the Society itself. Moreover, the Lengsfelder case seeks no relief against the Society that is in any way inconsistent with the 1950 judgment, but rather includes a claim that the Society's Directors were not abiding by the voting provisions of the judgment. In any event, the litigation has not progressed beyond the procedural stage, and the impact of the 1960 judgment upon the case is yet to be determined.

Further Amended Final Judgment" (R. 119-146), the Department of Justice made many factual assertions upon which the District Court must have relied, else it would have had no basis whatever for deciding whether to approve the 1960 modifications. In its opinion on the proposals, the District Court sometimes refers to these factual statements by the Department of Justice as "alleged" (see, *e.g.*, R. 665-666) or as "claimed" (*e.g.*, R. 663), but in other instances (*e.g.*, R. 665 on the "Weighting Rules") restates the Government's assertions as facts. ASCAP also leaves unexplained just how the District Court could state (R. 663) that "ASCAP does not admit any of the Government allegations", and yet, after delivering its opinion, state in response to a comment from counsel, "I find no factual dispute here" (R. 589). What is not obscure is that ASCAP was willing to have the Department of Justice make factual representations, even though it disagreed with them, and indeed was willing to make factual representations of its own (*e.g.*, R. 305, 347, 351-352), but was and is unwilling to have appellants lay before the District Court further facts which are relevant to the question which it was called upon to decide—whether the proposed modifications will accomplish the antitrust purposes of the suit. Evidently ASCAP is satisfied to rely upon only certain facts developed in the proceeding below and in the Congressional Hearings (*e.g.*, ASCAP Br. pp. 33, 44, 49, 51), but no others.[5]

[5] ASCAP is not disturbed about asserting "facts" which are based upon information to which the Directors alone are privy. Citing no source, ASCAP states that in the recent election for the Board of Directors the ten largest publisher groups "had only 31.88 per cent of the eligible votes" (Br. p. 53). Anticipating that the Directors might seek to make exactly such unilateral

Certainly, appellee ASCAP's citation to factual references which purportedly controvert those relied upon by appellants can establish no "facts".[6] Rather, any

use of the voting records relating to the election, appellants earlier formally requested information that would have permitted an independent evaluation of the extent of the voting power that was held and exercised in the election by the ten largest publishers. Counsel retained by the Directors refused appellants' request in its entirety, and appellants have thus had no opportunity to analyze the bare assertion in the ASCAP brief. A further request for an explanation of the figure cited in the brief was unavailing. See Appendix, pp. i-vi. Even without the information appellants had requested in order to evaluate accurately the voting strength of the largest publishers in the last election, the figure cited by ASCAP is of questionable probative value in this appeal. The recent election for Directors took place while the appeal was pending; it is doubtful that in this period the ten largest publishers would have acted to enhance their voting power to the maximum of 41 percent authorized by the 1960 judgment. An inquiry might well disclose that steps were taken to decrease the voting power of these publishers somewhat.

[6] Particularly when the factual references are inaccurate. Thus, contrary to the statement in the ASCAP brief (p. 53), it appears that newly-elected director E. H. Morris, an officer of one of the ten largest publishers (R. 275-276), has served on the Society's Board of Directors in the past (see ASCAP Membership Directories dated January 1 and August 31, 1937, and April 1, 1939), and indeed—as appellants are prepared to show—was then the representative of the group of publisher member affiliates that has been the largest in the Society for many years, the "Warner Group" (R. 276). And ASCAP's reference (Br. p. 44) to an early proposal participated in by an officer of one of the appellants (before that appellant, a publishing company, was formed), that some of the Society's revenues be distributed to *writers* on the basis of length of membership disregards the clear statement that such payments were to be made only to writer members whose works had received a certain minimum of performances (ASCAP Hearings, p. 390). The proposal, moreover, was part of many other suggested revisions in the Society's system of distributing writer revenues that were considered by a committee of writer members; the committee accomplished nothing because of the opposition of the Society's Directors (ASCAP Hearings, pp. 94-95, 686).

factual dispute between the parties is of significance to this appeal primarily because it highlights the need for an adequate evidentiary hearing in the court below as to whether the challenged provisions of the 1960 judgment should be adopted.

CONCLUSION

For the reasons set forth in the briefs for appellants, the order of the District Court denying appellants' motion to intervene pursuant to Rule 24(a)(2) should be reversed, and the case remanded to the District Court for further proceedings.

Respectfully submitted,

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